



The University of the State of New York

The State Education Department State Review Officer

No. 07-006

Application of the BOARD OF EDUCATION OF THE LINDENHURST UNION FREE SCHOOL DISTRICT, for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:

Lamb & Barnosky, LLP, attorney for petitioner, Robert H. Cohen, Esq., of counsel

John J. McGrath, Esq., attorney for respondent

DECISION

Petitioner, the Board of Education of the Lindenhurst Union Free School District, appeals pursuant to section 279.10(d) of the Regulations of the Commissioner of Education from an impartial hearing officer's second interim decision determining the child's pendency placement for the duration of a due process proceeding in which the child's parent challenge the appropriateness of the program recommended by petitioner's Committee on Special Education (CSE) for the student for the 2006-07 school year. The appeal must be sustained.

When the impartial hearing commenced on December 7, 2006, respondent's son was 11 years old and attending the sixth grade at the Sappo School (Sappo). Sappo is a private school that has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (8 NYCRR 200.7, 200.1[d]). The parties do not dispute the student's eligibility for special education services as a student with a hearing impairment (Dist. Ex. L at p. 1; see 8 NYCRR 200.1[zz][5]).

The student has attended petitioner's schools for a number of years and reportedly has received special education services since the age of three (see Tr. p. 108; Dist. Exs. BB at p. 2; KK).¹ According to background information in a December 2004 neuropsychological evaluation report, the student suffered head injuries at the ages of three and six and has a 65% hearing loss in the right ear (Dist. Ex. BB at p. 2). The neuropsychologist also reported that the student suffers

¹ I note that upon commencement of this appeal, the proceedings before the impartial hearing officer had not come to conclusion and, as a result, the record is not complete. Accordingly, the details of the student's educational history are provided only for contextual purposes.

visual loss on the right side (Id.). According to the neuropsychologist, the student also was diagnosed with an attention deficit hyperactivity disorder (Dist. Ex. BB at p. 2; Tr. p. 161). Petitioner's school psychologist presented similar background information about the student in her December 2004 psychological evaluation report (Dist. Ex. DD at p. 3).

The student's October 21, 2005 individualized education program (IEP) (fifth grade) provided for an inclusion program with special education provided through direct consultant teacher services for 45 minutes per day in language arts and reading (Dist. Ex. L at p. 1). Related services for the student included a 1:1 aide, a teacher of the deaf, occupational therapy, and transportation described as "Door to Door Transportation - District" (Dist. Ex. L at p. 1).² The CSE recommended a modified curriculum in all areas, additional time for the student to complete language arts tasks, a positive reinforcement plan to assist the student with remaining on task, access to an auditory trainer, and a variety of testing accommodations, including reading the student's reading comprehension tests aloud, spelling exemption, additional testing time, special testing location, and having directions and tests read aloud to him (Dist. Ex. L at pp. 1-2).

The CSE met on March 8, 2006 to conduct an annual review and prepare an IEP for the student for the 2006-07 (sixth grade) school year (Dist. Ex. I). According to the CSE minutes, additional testing would be conducted to assess the student's need for a phonologically-based approach to reading, to consider assistive technology, and to measure spelling and reading comprehension (Dist. Ex. I at p. 6). On June 7, 2006, the CSE reconvened and the updated reading assessments were reviewed, after which the CSE recommended instituting a phonologically-based reading instruction program and adding a resource room to the consultant teacher services to deliver the program (Dist. Ex. I at p. 5).³ At the same meeting, respondent asserted that extended school year (ESY) services should be provided to the student; however, the CSE determined the student was not eligible for ESY services (Dist. Ex. I at p. 5). The CSE reconvened on June 21, 2006, at which time the assistive technology evaluation was reviewed and a plan was recommended for the gradual introduction of keyboarding and the assistance of Kurzweil 3000 software for reading decoding (Dist. Ex. I at p. 5). The CSE reviewed guidelines for ESY services and maintained its position that the student was ineligible for ESY services (Dist. Ex. I at p. 5).

In a letter dated June 21, 2006, respondent requested an impartial hearing alleging, among other things, that petitioner had improperly failed to offer ESY services and to offer the student a free appropriate public education (FAPE)⁴ (Dist. Ex. B).

² I note that none of the student's IEPs or the CSE minutes identify the student's needs with regard to transportation.

³ Respondent identified this as the Wilson reading program (Tr. pp. 113-114; 434).

⁴ The term "free appropriate public education" means special education and related services that -

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

By letter dated July 5, 2006, petitioner confirmed the appointment of an impartial hearing officer (Dist. Ex. D).⁵ On July 19, 2006, respondent orally requested that the impartial hearing officer issue an order determining the student's pendency placement (see Dist. Ex. E at p. 3). In a first interim decision dated August 6, 2006, the impartial hearing officer determined that the student's pendency placement for the duration of the administrative proceedings was the October 21, 2005 IEP (October 2005 IEP) with the addition of the June 21, 2006 CSE's recommendation to implement a phonologically-based reading instruction program and a resource room as set forth in the proposed 2006-07 IEP (Dist. Ex. E at pp. 3-4).^{6, 7} Neither party appealed the August 6, 2006 decision of the impartial hearing officer determining pendency.

By letter dated August 9, 2006, respondent rejected the placement recommended by the June 21, 2006 CSE for the 2006-07 school year, without stating her concerns, and she notified petitioner of her intention to place the student in Sappo and seek tuition reimbursement (Tr. pp. 87-88; Dist. Ex. OO; see 20 U.S.C. § 1412[a][10][c][iii]). According to respondent, she contacted petitioner's transportation department in August 2006 and requested transportation of the student to Sappo, asserting that the student was eligible for transportation to Sappo regardless of the pendency placement (Tr. pp. 88-89; Parent Ex. 16 at p. 1). Petitioner orally informed respondent that the student was not eligible for transportation (Tr. p. 89). By letter dated September 8, 2006, petitioner denied respondent's request in writing, stating that she failed to request transportation by April 1, 2006 (Dist. Ex. MM; see also Tr. pp. 93-94).⁸

Respondent filed an amended impartial hearing request dated September 8, 2006, in which she sought, among other things, reimbursement for tuition and transportation costs for placement at Sappo for the 2006-07 school year (Dist. Ex. F at pp. 9-10).

⁵ Although the instant due process proceeding were commenced in June 2006, there is no indication in the record that the due process proceeding has concluded. I remind the parties that federal and state regulations provide for the rendering of a final impartial hearing officer decision, in the absence of permitted extensions of time, not later than 45 days from the date required for commencement of an impartial hearing (34 C.F.R. § 300. 515; 8 NYCRR 200.5[j][5]).

⁶ The impartial hearing officer inadvertently described the October 21, 2005 IEP in his decision as the "October 21, 2006 IEP," which was a typographical error he corrected orally on the record at the commencement of the hearing (Tr. p. 5).

⁷ The impartial hearing officer noted that the student would be attending the Lindenhurst Middle School in September 2006 (Dist. Ex. E at p. 2). The parties did not dispute the June 21, 2006 CSE's recommendation to implement a phonologically-based reading instruction program and a resource room as set forth in the proposed 2006-07 IEP and, therefore, the impartial hearing officer modified the student's special program and services to include these two additional services (Dist. Ex. E at pp. 3-4).

⁸ Petitioner submits with the petition an additional letter dated October 23, 2006 regarding the denial of respondent's transportation request. Generally, documentary evidence not presented at a hearing may be considered in an appeal from an impartial hearing officer's decision if such additional evidence could not have been offered at the time of the hearing and the evidence is necessary to enable the State Review Officer (SRO) to render a decision (Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020). In this case, the letter was available at the time of the hearing, and it is not necessary for my review and, therefore, I decline to accept it (Application of a Child with a Disability, Appeal No. 06-058; Application of a Child with a Disability, Appeal No. 05-020).

At the commencement of the impartial hearing on December 7, 2006,⁹ respondent asserted that transportation and services of the 1:1 aide were not being provided to the student at Sappo (Tr. pp. 49, 59-64; Dist. Ex. L at p. 1). According to respondent, other services, such as occupational therapy, consultant teacher, and speech services were provided by petitioner, apparently by agreement, to the student (Tr. p. 111). Respondent also testified that transportation services had not been discussed at the CSE meetings (Tr. pp. 284, 287).

At the impartial hearing, petitioner explained that it was providing services to the student at Sappo "that he would be getting were he in the district" (Tr. p. 55). However, petitioner argued that the October 2005 IEP required transportation for the student only within the geographical limitations of the school district and that transportation to Sappo was not required (Tr. pp. 38-39; Dist. Ex. L at p. 1). Petitioner also asserted that the 1:1 aide was not being provided at Sappo because the student-teacher ratios at Sappo were much smaller than at petitioner's schools and an appropriate student-teacher ratio is already in place for the student at Sappo (Tr. pp. 55-56).

In a second interim decision, dated December 10, 2006, the impartial hearing officer changed the student's pendency and ordered that petitioner provide transportation to and from Sappo, arrange to provide a one to one aide for six hours per day at Sappo, and reimburse respondent for the already incurred transportation costs.

On appeal of the impartial hearing officer's second interim decision, petitioner asserts that the impartial hearing officer erred by exceeding his authority and changing the student's pendency placement from the last agreed-upon IEP to the unilateral placement selected by respondent. Petitioner argues that in making his pendency determination, the impartial hearing officer was required to look solely to the IEP last agreed upon by the parties, and that respondent does not have the right to pick and choose different aspects of the pendency placement to be provided at the nonpublic school. Petitioner requests an order that the student's pendency placement was determined by the August 6, 2006 pendency determination.

On appeal, respondent contends that the impartial hearing officer did not alter the pendency placement for the student; rather, the impartial hearing officer ordered petitioner to provide transportation and a 1:1 aide in accordance with the October 2005 IEP. Respondent denies that she is picking and choosing which parts of the pendency placement she wishes to embrace or ignore.

In this case, the student's pendency placement was established under the Individuals with Disabilities Education Act (IDEA) and New York Education Law as the October 2005 IEP, as modified to include the phonetically-based reading program and the resource room (Dist. Exs. E at pp. 3-4; I at pp. 1-2, 5; L) (see 20 U.S.C. § 1415 [j]; 34 C.F.R. § 300.518;¹⁰ see also Educ. Law § 4404[4][a]; 8 NYCRR 200.5[m]). Respondent removed the student from his then current

⁹ The record also includes transcripts and exhibits entered into evidence on December 8, 14 and 15, 2006.

¹⁰ The Code of Federal Regulations (34 C.F.R. Parts 300 and 301) has been amended to implement changes made to the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Improvement Act of 2004. The amended regulations became effective October 13, 2006. In this case, none of the new provisions contained in the amended regulations are applicable because all relevant events occurred prior to the effective date of the new regulations. However, for convenience, citations herein refer to the regulations as amended because the regulations have been reorganized and renumbered.

educational placement subsequent to the initiation of due process proceedings and the impartial hearing officer's unappealed August 6, 2006 pendency determination. The United States Supreme Court has held that the IDEA pendency provisions do not require parents to leave their child in a particular placement that they do not believe is appropriate, but that choosing to unilaterally place the student shifts the risk of the financial responsibility to the parents (see Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 373-74 [1985]). On the other hand, if a school district fails to offers a student a FAPE, it may be liable for tuition and transportation costs related to an appropriate unilateral private placement.

An impartial hearing officer's decision is final and binding upon the parties unless appealed to an SRO (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 04-061; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 04-018; Application of the Bd. of Educ., Appeal No. 03-110; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100; Application of a Child with a Disability, Appeal No. 02-073). The August 6, 2006 pendency determination was not appealed by either party. Hence, the findings and determinations not appealed are final and binding on the parties unless appealed to the SRO (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[k]).

In the instant case, on August 6, 2006, I note that the impartial hearing officer properly determined the student's pendency placement. He then issued a subsequent determination modifying his prior determination. Under the circumstances presented herein, I find that his second pendency determination impermissibly changed the student's previously determined pendency placement. Unless the school district and the parents agree otherwise, a student's pendency placement may be modified only after a decision of the SRO in an administrative appeal agrees with the parent(s) that a change of placement is appropriate (see 34 C.F.R. § 300.518[d]; 8 NYCRR 200.5[m][2]).

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated December 10, 2006 is annulled.

Dated: Albany, New York
March 5, 2007

PAUL F. KELLY
STATE REVIEW OFFICER